Supreme Court, U.S.
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91-1255

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD DeROBERTIS, Warden; and MICHAEL O'LEARY, Assistant Warden,

Petitioners,

v.

ROBERT HENDERSON; THOMAS JEFFERSON; WILLIE WILLIAMS; and WARREN LEE HARRIS, Individually and on behalf of all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prison officials are entitled to qualified immunity from liability for damages in connection with their course of action during temporary, unprecedented emergency conditions at the prison, notwithstanding the existence of prior case law to guide their conduct under non-emergency circumstances?

2. Whether the warden and assistant warden of a maximum security prison may be held liable for failure to personally verify the satisfaction of each prisoner's clothing and supply needs during a period of unprecedented cold weather conditions coupled with a malfunctioning heating system?*

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* Petitioners present this question in an effort to preserve the issue for argument in the event certiorari is granted on the first question presented. It is not argued as an independent reason for the grant of certiorari.

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IN THE

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RICHARD DeROBERTIS, Warden; and MICHAEL O'LEARY, Assistant Warden,

Petitioners,

v.

ROBERT HENDERSON; THOMAS JEFFERSON; WILLIE WILLIAMS; and WARREN LEE HARRIS, Individually and on behalf of all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 940 F.2d 1055, and is reprinted in the appendix hereto at App. 1.

The Court of Appeals' decision reflects a consolidated disposition of three decisions of the United States District Court for the Northern District of Illinois, Eastern Division, none of which is reported. The memorandum opinion in *Jefferson v. Lane* and *Henderson v. Lane* (Nos. 82 C 1263 and 82 C 0887 consolidated), is reprinted in the appendix hereto at App. 13. The memorandum opinion and

order in *Harris v. DeRobertis*, No. 86 C 5094, is reprinted in the appendix hereto at App. 23. The memorandum order in *Williams v. DeRobertis*, No. 86 C 9267, is reprinted in the appendix hereto at App. 35.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1991. A petition for rehearing was denied on November 1, 1991. App. 37. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. VIII

Excessive bail shall not be required, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Procedural Background

Respondents, inmates at the Stateville Correctional Center, a maximum security prison in Joliet, Illinois, brought these actions claiming violations of their rights to be free from cruel and unusual punishment, as a result of the conditions at Stateville from January 8, 1982 through January 11, 1982. During that time, Stateville was beset with record-breaking cold weather; additionally, the heating system of the segregation cellhouse in which the respondents were housed was not working to its full capacity. The essence of the respondents' complaints is that the petitioners, by failing to take various actions and continuing to house the inmates in the B-West segregation unit, which was concededly cold during that four-day

period, violated the inmates' eighth amendment rights to be free from cruel and unusual punishment.

After a jury trial, a verdict was returned in favor of respondents Henderson and Jefferson. The court, however, granted petitioners' motion for a judgment notwithstanding the verdict on the basis of qualified immunity. App. 22.

In separate proceedings based on the same facts and circumstances, the district court dismissed the complaints filed by respondents Harris and Williams. App. 34, 36. By order of the court of appeals, all of the cases were consolidated for purposes of appeal.

The Seventh Circuit reversed the district court's grant of qualified immunity to petitioners and its entry of a judgment notwithstanding the verdict. It also vacated the dismissals of the Harris and Williams complaints, and remanded those cases for further proceedings. App. 12.

Petitioners' request for a rehearing was subsequently denied, as was their motion to the Seventh Circuit to stay its mandate pending application for certiorari.

Factual Background*

During the period from January 8, 1982, through January 11, 1982, the entire northern section of the State of Illinois was beset by record-breaking cold weather. ("H" R. Doc. 92 at 40). The temperature measured 22

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* These facts are drawn primarily from the *Henderson* and *Jefferson* records, and references to the records will be in the form of "H" R. Doc. ____, and "J" R. Doc. ____ as appropriate. Reference to Volumes I-III of the transcript of proceedings will be to Tr. 1, ____, Tr. 2, ____, or Tr. 3, ____.

degrees below zero with a wind chill factor of 80 degrees below zero. ("H" R. Doc. 92 at 40-41). Henderson and Jefferson, two inmates at Stateville, were housed in the B-West segregation area within Stateville during this extremely cold period. ("H" R. Doc. 92 at 34).

It is undisputed that on January 8, 1982 the main heating system of B-West was not working to full capacity; it is also undisputed that while attempts were made to repair the heating system, that system was not working at full capacity until January 12, 1982. (*Id.*).

The Inmates' Case

Robert Henderson

During the four-day period in question, Henderson did not leave his cell. (Tr. 1, 37). As to the condition of the cellhouse, Henderson said that there were several broken windows in the wall opposite his cell; some of the broken windows were covered with cardboard and blankets. (Tr. 1, 38).

Henderson testified that the only clothing he had in B-West was what he had on when he was brought to segregation. (Tr. 1, 41). When asked why he did not have any of the clothes from his cell in C House, Henderson replied that "Lieutenant Keane instructed [him] that [he] couldn't take nothing with [him] at that particular time." (*Id.*). With respect to his bed coverings, Henderson testified that he was initially given two sheets and was subsequently given a blanket; he claimed that he asked for additional blankets, but stated that he received none. (Tr. 1, 48). He then testified as to the effects of the cold weather on him and his cellmate.

Upon cross-examination, Henderson acknowledged that inmates had been responsible for the broken windows which were opposite the cells. (Tr. 1, 60). He also acknowledged that he was brought cold tablets and aspirin during the four-day period at issue. (Tr. 1, 64).

Thomas Jefferson

Jefferson stated that he was transferred to B-West segregation on December 25, 1981. (Tr. 1, 79). Like Henderson, Jefferson was permitted to bring only the clothes he was wearing at the time of his transfer to B-West. (Tr. 1, 82). Jefferson stated, however, that he never asked anybody about obtaining the clothing he had left behind in C-House. (Tr. 1, 83). He also testified about the effect of the cold weather.

Upon cross-examination, Jefferson was questioned about his testimony that there was no heat in B-West. He admitted that there were several heaters in B-West; he could only state that the one heater near his cell was not operating properly. (Tr. 1, 128-29).

Other Testimony

Three other inmates testified, describing the conditions in B-West. (Tr. 1, 143-58, 160-69, 174-98). Inmate Mondie testified regarding his assistance of correctional employees who were engaged in efforts to repair the heating system. (Tr. 1, 174 - Tr. 2, 198).

The Prison Officials' Case

Michael O'Leary

O'Leary, the Assistant Warden of Stateville, explained that the facility experienced staff shortages during the four-day period in question, due to the extreme weather conditions. (Tr. 2, 257). In order to alleviate the problems with staff shortages, overtime was implemented. (*Id.*).

When asked whether he had ever contemplated moving the inmates from B-West to another part of the institution, O'Leary replied in the negative. (Tr. 2, 259). Elaborating, he noted that there were special considerations concerning the inmates in B-West because it housed protective custody and segregation inmates; the unique circumstances surrounding those inmates required direct supervision for security purposes. (Tr. 2, 260-262). In light of the security rules which applied to the two distinct groups of inmates, O'Leary stated that he could not house segregation inmates with general population inmates. (*Id.*).

O'Leary recalled conversations he had with several of the inmates in B-West. He did not recall speaking to any specific inmates; he just recalled that he had spoken with several of them on the topic of the cold conditions. (Tr. 2, 273). He indicated that the purpose of his conversations was to inform the inmates that the prison officials were working on the problem. (*Id.*).

O'Leary was asked whether he had specifically looked inside Henderson and Jefferson's cell to see if they had adequate clothing and blankets; he replied in the negative. (Tr. 2, 295). Elaborating, O'Leary stated that he did not deal with those two inmates specifically. (Tr. 2, 296). He also noted that he was not aware that they were missing any clothes. (*Id.*). When asked if he had done anything

to make sure that the broken windows were covered, O'Leary said that he had spoken with Superintendent Boles about covering the windows with cardboard. (Tr. 2, 297). Blankets or cardboard were not put in front of the cells in B-West because that would have presented both a security risk and a fire hazard. (*Id.*).

O'Leary further testified that he did not return Henderson or Jefferson to their cells in C-House; nor did he provide auxiliary heaters in B-West. (*Id.*). Additionally, O'Leary did not contact other prison facilities for the purpose of transferring the segregation inmates. (Tr. 2, 298). He added that it would have been impractical to transfer the segregation inmates to other institutions due to the extreme weather conditions throughout the State and the fact that such a move would entail unacceptable security risks. (Tr. 2, 312).

Richard DeRobertis

DeRobertis was the Warden of Stateville during the pertinent time period. (Tr. 3, 401). When asked about the heating system in B-West, DeRobertis responded that he had never been informed that heat was not functioning. (Tr. 3, 432). In response to a query about his contact with the plaintiffs during that period, DeRobertis testified that he had no contact with Henderson or Jefferson. (Tr. 3, 433). DēRobertis further testified that he was not present when Henderson or Jefferson were brought to segregation. (Tr. 3, 443).

As to the possibility of moving the inmates to another cellhouse or to another institution, DeRobertis stated that there could not have been an evacuation of B-West due to the security risks involved in such an act. (Tr. 3, 434). Specifically, DeRobertis noted that it took two days to

move segregation inmates within the cellhouse itself; he added that there was not enough security to move the segregation inmates to other parts of the institution. (Tr. 3, 435, 438).

Delineating his duties upon cross-examination, DeRobertis stated that he was generally responsible for the overall functioning of the institution. (Tr. 3, 446). He was not, however, aware of heating repairs which took place in B-West. (Tr. 3, 447). In response to a question of whether he checked to see that Henderson and Jefferson had proper clothing and blankets, DeRobertis answered in the negative: "[t]hey were one of two hundred people and, no, I did nothing to specifically check on those two individuals that's correct." (Tr. 3, 449).

Other Testimony

Boles was the Superintendent of B-West from October, 1981 until April, 1982. (Tr. 2, 316). He was responsible for ensuring that all three shifts within B-West were fully staffed; he was also responsible for delivering the basic services to the B-West inmates. (*Id.*). Such services included recreation, showers, medical attention and the distribution of basic supplies which were passed out weekly. (*Id.*). Boles further testified that he was responsible for the repairs and maintenance in B-West; specifically, it was his duty to ensure that the proper work orders were requested when malfunctions arose. (Tr. 2, 324).

Milo Newton ("Newton"), who was a correctional sergeant at Stateville, testified that he was assigned to B-West during the time in question. (Tr. 2, 364). He said that his duties at that time were to oversee the performance of the other unit officers and to coordinate activities for the inmates in B-West. (*Id.*). Newton stated that dur-

ing that period he received inmate complaints regarding the cold conditions; he noted that most of the complaints involved requests for additional blankets. (Tr. 2, 367). He testified that some blankets were distributed to B-West inmates. (*Id.*).

REASONS FOR GRANTING THE WRIT

THE SEVENTH CIRCUIT'S OVERLY BROAD GENERALIZATION OF THE EIGHTH AMENDMENT RIGHTS AT ISSUE DEPRIVED PETITIONERS OF THEIR RIGHT TO QUALIFIED IMMUNITY FROM LIABILITY FOR ADVERSE CONDITIONS OF CONFINEMENT IN CONNECTION WITH THEIR RESPONSE TO EMERGENCY WEATHER CONDITIONS AND EQUIPMENT MALFUNCTIONS AT THE PENAL INSTITUTION THAT THEY SUPERVISED.

In *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991), it was taken for granted "that if a prison boiler malfunctions accidentally during the cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm." 111 S. Ct. at 2325. In the present case, the Seventh Circuit held not only that such a scenario could give rise to liability on the part of prison officials, but that a reasonable official should have known, in January 1982, that the temporary failure to provide prisoners with adequate heat under such emergency conditions was a clearly established constitutional violation.

The Seventh Circuit broadly framed the qualified immunity question as whether "pre-1982 cases describe a clearly established constitutional right of prison inmates to adequate heat." By so doing, the court effectively "convert[ed] the rule of qualified immunity that our cases

plainly establish into a rule of virtually unqualified liability simply by alleging violation of [an] extremely abstract right[ ]." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Petitioners do not dispute a general right of prisoners to receive adequate heat, but they submit that a rule of such generality cannot reasonably be applied to evaluate their actions under emergency, rather than ordinary, circumstances. *Anderson v. Creighton*, 483 U.S. at 639. The proper qualified immunity inquiry in this case is whether it was authoritatively decided in 1982 that the actions undertaken by petitioners in response to the accidental heating malfunction, during unprecedented weather conditions, were constitutionally inadequate. *Wilson v. Seiter* strongly suggests that, even now, the eighth amendment does not shield prisoners from the temporary ill effects of emergency weather situations. Petitioners submit that the contrary cannot have been the clearly established law a decade ago.

The Seventh Circuit's refusal to narrow the qualified immunity issue beyond the general obligation to provide heat in prison cells demonstrates a need for this Court to revisit the immunity doctrine, especially in terms of its extension to emergency temporary situations where normal services cannot be supplied. The particular circumstances under which a state official acts must be recognized to control not only his ultimate liability, but his ability to recognize the parameters of implicated rights.

Given the unprecedented conditions at Stateville in January 1982, and the genuine security concerns that limited officials' options in responding to the emergency, the prison officials responsible for the institution as a whole should not be held personally liable for continuing to operate their institution with the expectation that weather

conditions would improve and equipment malfunctions would soon be repaired. The body of law in existence in 1982 did not establish a constitutional right to be free from temporarily inadequate heat during an emergency. While it is conceded that there were several pre-1982 cases establishing an inmate's "general" right to adequate heat (see App. at 6-7), the District Court correctly observed that:

> none of the prior cases had dealt with the situation confronting the defendants which was the temporarily inadequate heat in an eighth amendment context.
>
> The defendants had no instructive legal precedent to look to with which to conform their actions. With hindsight plaintiffs' counsel suggested that to avoid an eighth amendment violation the defendants should have moved plaintiffs and the entire Cellhouse B-West to other locations. (Tr. 486). Fixing the B-West heating system, which was being attempted, or the temperature rising, which was beyond defendants' control, would have produced the same result.

("H" R. Doc. 118 at 8; App. at 19-20).

Unquestionably, petitioners were confronted with a unique situation which did not lend itself to an easy solution. Their determination that the inmates could not be relocated, but that repairs to the heating system would be expedited and blankets would be distributed, was not clearly established, in 1982, to constitute deliberate indifference to the welfare of the inmates.* The dearth of

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* Respondents testified to their complaints to petitioners, either orally or in writing, about the temperature in B-West; however, a failure to respond personally to each complaint does not establish petitioners' liability under the eighth amendment. For example, O'Leary's uncontroverted testimony reveals that he advised Super-

(Footnote continued on following page)

"closely analogous" case law on this issue should have led the Seventh Circuit to sustain the District Court's ruling on qualified immunity. *See, e.g., Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988); *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987).

In sum, this is not a typical "conditions of confinement" case, but one which presents a significant question regarding prison conditions during a temporary and extraordinary situation. This Court is urged to grant certiorari to examine the propriety, for qualified immunity purposes, of holding supervisory prison officials who are attempting to cope with an emergency to the most general standards applicable to ordinary circumstances and conditions.

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* *continued*

intendent Boles to distribute blankets to the inmates. (Tr. 2, 270). Boles testified that blankets were distributed; his testimony was corroborated by Sergeant Newton. (See Tr. 2, 327, 367). Petitioners were unable to state that a particular respondent had, in fact, received specific supplies, but it is untenable to suggest that clearly established law required O'Leary either to ensure Boles' compliance or distribute the blankets himself. Accordingly, petitioners have sought to preserve in this petition an issue not addressed by the Seventh Circuit, although it was raised before that court: whether any constitutionally cognizable harm to respondents was personally attributable to the petitioners.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari be granted to review the decision of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2698

ROBERT HENDERSON and THOMAS JEFFERSON,

Plaintiffs-Appellants,

v.

RICHARD DEROBERTIS, Warden; and
MICHAEL O'LEARY, Assistant Warden,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 887 and 82 C 1263—**James F. Holderman,** *Judge.*

Nos. 88-3407, 88-3430

WILLIE WILLIAMS; and WARREN LEE HARRIS, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs-Appellants,

v.

RICHARD DEROBERTIS and MICHAEL O'LEARY,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 86 C 5094 and 86 C 9267—**Milton I. Shadur,** *Judge.*

ARGUED MAY 10, 1990—DECIDED AUGUST 15, 1991

Before COFFEY and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

KANNE, *Circuit Judge.* During a four-day period in 1982, the outdoor temperature at Illinois' Stateville Correctional Center plunged to a low of 22 degrees below zero; the prison's heating system in Cellhouse B-West malfunctioned at the same time. Two of some 300 inmates housed in B-West, Thomas Jefferson and Robert Henderson, filed separate complaints under 42 U.S.C. § 1983 alleging that prison officials violated their eighth amendment rights by subjecting them to freezing temperatures which constituted unusual punishment. In a consolidated trial a jury apparently agreed that because of the deliberate indifference of prison officials, Jefferson and Henderson received neither adequate protection nor relief from the freezing conditions in their cells. The jury awarded each plaintiff $3,000.00 in compensatory and $2,000.00 in punitive damages. Defendants filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial. The district judge entered judgment in favor of defendants notwithstanding the verdict because he found that qualified immunity protected the officials from liability. The motion for a new trial was not considered.

Soon after the jury returned their verdicts, two other inmates of B-West, Warren Lee Harris and Willie Williams, filed separate § 1983 complaints based upon the same factual circumstances. Harris also sought to certify as a class the prisoners confined in Cellhouse B-West during the four-day period. The district judge to whom the Harris and Williams cases were assigned, put these cases on hold until a decision was rendered on the defendants' post-trial motions for judgment notwithstanding the verdict in the Henderson and Jefferson cases. After the judgment notwithstanding the verdict was granted in favor of the prison officials, class certification was granted to Harris. The Harris and Williams cases then were dismissed with prejudice on the basis of the qualified immunity decision rendered in the Henderson and Jefferson cases.

All four cases have been consolidated in this appeal. Because we find that the prison officials were not entitled to the protection of qualified immunity, we reverse the district court's judgment notwithstanding the verdict, reinstate the jury's verdicts in favor of Henderson and Jefferson, and vacate the dismissal of the complaints of Harris and Williams and remand those cases for further proceedings.

The outcome of this appeal is based on the judgment notwithstanding the verdict entered in favor of Jefferson and Henderson,[1] and our review of that decision is *de novo. David Copperfield's Disappearing, Inc. v. Haddon Advertising Agency Inc.*, 897 F.2d 288, 291 (7th Cir. 1990); *Webb v. City of Chester*, 813 F.2d 824, 827 (7th Cir. 1987).

A judgment notwithstanding the verdict, granted in favor of a defendant, "is proper only if reasonable people, viewing the facts most favorably to the plaintiff and disregarding conflicting unfavorable testimony, could not conclude that the plaintiff has made out a prima facie case." *Rakovich v. Wade*, 850 F.2d 1180, 1188 (7th Cir.) (citing *Crowder v. Lash*, 687 F.2d 996, 1002 (7th Cir. 1982)), *cert. denied*, 488 U.S. 968, 109 S. Ct. 497 (1988). We must view all the evidence and inferences in the light most favorable to Henderson and Jefferson, who prevailed with the jury; any conflicts in the evidence must be resolved in favor of those inmates and every permissible

[1] The question of a new trial is not addressed in this appeal. Notwithstanding Federal Rule of Civil Procedure 50(c)(1), there was no ruling on the alternate motion for a new trial when the JNOV was granted. As we have said before, where the motion for a new trial is not pressed on the trial court after the grant of JNOV, it is abandoned. *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 353 (7th Cir. 1974); *Vera Cruz v. Chesapeake & O. R. Co.*, 312 F.2d 330 (7th Cir.), *cert. denied*, 375 U.S. 813, 84 S. Ct. 44 (1963). Here the appellees failed to pursue their motion for a new trial with the district judge and furthermore, failed to argue for a ruling on that motion in this appeal; we are not obliged to remand for such a ruling.

inference must be drawn in their favor. *Rakovich*, 850 F.2d at 1187-88; *Mathewson v. National Automatic Tool Co.*, 807 F.2d 87, 90 (7th Cir. 1986). Thus, we base our analysis on the following facts which are presented with the required inferences drawn and conflicts resolved in favor of Henderson and Jefferson.

Frigid weather descended upon northern Illinois from January 8th through January 11th of 1982. The sub-zero temperatures recorded dropped to twenty-two degrees below zero with a corresponding wind chill factor of eighty degrees below zero. During these abnormally cold days, many areas in the Stateville Correctional Center experienced colder than usual temperatures. But in Cellhouse B-West, the heating system malfunctioned and the inside temperatures there fell and remained below freezing. Broken windows in the cell block permitted the frigid outside air to flow in, ice formed in the cells, and "it was cold enough to see your breath." Richard DeRobertis, the former warden of Stateville, and Michael O'Leary, the former assistant warden of operations, were present in B-West at various times during the period from January 8 through January 11. O'Leary testified that it was important with the kind of environmental conditions being experienced by the inmates that the administrative officials be present so inmates would know that officials were aware of the severity of the conditions. Correctional officers, cellhouse workers and the warden wore winter coats, hats and gloves while in B-West during this four-day period. An inmate plumber while doing work in B-West on January 10th wore an overcoat with fur inside, a jumpsuit, pants, shirt, sweatpants, sweatshirt, longjohns, three pairs of socks, work boots with rubber boots over them, gloves and a skullcap and still was not warm.

Segregation inmates who were moved to B-West from their general population cells for violations of prison rules were not permitted to bring along any of their extra clothes such as winter coats or additional shirts. Henderson testified that after the heating system malfunctioned he asked O'Leary for blankets and clothes. Jefferson

wrote a letter to DeRobertis complaining that there was no heat, and also asked O'Leary, as he made his rounds, to get him out of Cellhouse B-West.

The assistant warden told the superintendent that extra blankets should be distributed. The superintendent said that extra blankets were passed out starting on Friday, the 8th. A senior corrections officer permitted extra blankets to be distributed upon request, provided that inmates would not use them as rugs. But Henderson, Jefferson and Harris did not receive additional blankets.[2]

Because of security concerns and because his personnel were working to fix the heat problem, assistant warden O'Leary never contemplated moving inmates from B-West to another part of the institution where the heating system worked. Moving a prisoner safely from his cell in Cellhouse B-West to other less secure areas required the presence of a correctional officer and the use of handcuffs on the prisoner. Moreover, despite efforts to bring in employees stranded in their homes by the cold weather, Stateville experienced staff shortages during the four-day period. Stateville officials took measures to have the heating system repaired, but four days passed before Henderson and Jefferson were provided with relief from the freezing conditions in Cellhouse B-West.

It was solely on the basis of qualified immunity that the verdict in favor of Henderson and Jefferson was set aside. Qualified immunity is a question of law reserved for the district judge and not the jury, but it must be determined within the framework of the particular facts of the case. *Rakovich*, 850 F.2d at 1180. Thus, it is in the context of the foregoing facts that we must judge the propriety of the district judge's grant of a judgment notwithstanding the verdict in favor of the defendants.

Government officials performing discretionary functions will be shielded from liability for damages where their

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[2] Harris testified in the Henderson and Jefferson jury trial prior to filing his own complaint.

conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A constitutional right still may be clearly established even if the precise action in question has not previously been held unlawful, however, the unlawfulness must then be apparent in the light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). A court should "look to whatever decisional law is available to ascertain whether the law is clearly established." *Rakovich*, 850 F.2d at 1209 (citing *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985)). Thus, a " 'sufficient consensus' based on all relevant case law, 'indicating that the officials' conduct was unlawful' " is required. *Landstrom v. Illinois Dept. of Children & Family Serv.*, 892 F.2d 670, 676 (7th Cir. 1990) (quoting *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied* 474 U.S. 1067, 106 S. Ct. 822 (1986)). This court has further elaborated on the "clearly established" standard and said that "the right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987) (citing *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986)). We have held that until a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been clearly established. *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987), *cert. denied*, 484 U.S. 1078, 108 S. Ct. 1057 (1988).

In its judgment, the district court said it could not "find the right plaintiffs asserted under the facts of this case to have been clearly established in 1982 to remove defendants' qualified immunity." Nevertheless, the district court, in its ruling, noted pre-1982 cases where appellate courts held that the constitution required prisoners to be provided with adequate heat and shelter. For example, the district court cited *Lareau v. Manson*, 651 F.2d 96 (2d Cir. 1981) (prisoners are entitled to adequate shelter);

Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981) (an institution has eighth amendment obligation to provide prisoners with adequate shelter or quarters); *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) (the state must provide reasonably adequate heat to inmates), *cert. denied*, 450 U.S. 1041, 101 S. Ct. 1759 (1981); *Wolfish v. Levi*, 573 F.2d 118, 125 (2d Cir. 1978) (the court said that "an institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety"), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) (allegation of inadequate heating reaches the level of cruel and unusual punishment); and *Bell v. Wolfish*, 441 U.S. at 529 n.11, 99 S. Ct. at 1869 n.11. Plaintiffs cite additional cases in support of the same proposition. *See Bono v. Saxbe*, 620 F.2d 609 (7th Cir. 1980) (the court said that insufficient heat is a factor frequently crucial to finding cruel and unusual punishment); *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974) (the court found that the "bathroom, kitchen, heating and housing facilities [were constitutionally] inadequate."). These pre-1982 cases describe a clearly established constitutional right of prison inmates to adequate heat. Thus, there was no question that in 1982 a reasonable prison official would have known of a prisoner's constitutional right to adequate protection from extreme cold.

The defendants position, however, is that they could not have known that prisoners had a constitutional right to adequate heat if emergency conditions intervened—apparently because no reported court decision describing inmates' constitutional rights addressed such a factual scenario. Put another way, the defendants claim that there was no clearly established constitutional right for prisoners to have adequate heat and shelter during the period of abnormal weather and heating conditions and therefore the defendants enjoyed immunity from the consequences of their actions in merely restoring the heat to normal after four days had elapsed.

Contrary to defendants' assertion, constitutional rights don't come and go with the weather. The right of prisoners to adequate heat and shelter was known in 1982 and that right is constant. What is not constant is the level of effort and the course of conduct by prison officials necessary to provide adequate protection from extremely cold weather.

Government officials will be shielded from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638, 107 S. Ct. at 3038. If the evidence demonstrates deliberate indifference by defendants in light of known hazardous conditions and while protective measures were in effect, then defendants are not entitled to qualified immunity. *Rellergert v. Cape Girardeau*, 924 F.2d 794, 797 (8th Cir. 1991). The Supreme Court has said that "deliberate indifference" is the standard to be used to determine the culpability of officials in prison condition cases which include claims alleging inadequacies in the temperature a prisoner is subjected to in his cell. *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321, 2326-27 (1991). In this circuit, we have said that defendants acted with deliberate indifference if they possessed actual knowledge of impending harm, easily preventable, so that a conscious, culpable refusal to prevent the harm could be inferred from their failure to prevent it. *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816, 107 S. Ct. 71 (1986).

It was the standard enunciated in *Franzen* (and ultimately in *Wilson*), that the jury applied in determining whether taking four days to repair the heating system in B-West, without providing any temporary or alternate means of protection from the subfreezing temperatures, constituted deliberate indifference on the part of the defendants. Whether the district judge or this court in weighing *all* the evidence in this case would have found that the defendants acted with deliberate indifference is not before us at this point. We are restricted in our review of contested matters in this case to only those facts in

evidence and inferences drawn therefrom which favor Henderson and Jefferson. While given the full range of evidence we may not have found that the defendants acted with deliberate indifference, that was the finding implicit in the verdict the jury was given the opportunity to return upon the denial of defendants' motion for directed verdict. Great credence is given to a jury's verdict in appellate review of a judgment notwithstanding the verdict based on a grant of qualified immunity. *Rellergert*, 924 F.2d at 797. As the district court found in its analysis,

> [t]he jury by its verdict awarding plaintiffs compensatory damages found that plaintiffs had shown by a preponderance of the evidence [t]hat at defendants O'Leary's and DeRobertis's direction, or with their knowledge or consent, in deliberate indifference to plaintiffs' constitutional rights, plaintiffs were confined in Cellhouse B-West from January 8th through January 11th, 1982. . . . [A]nd due to defendants' deliberate indifference, plaintiffs did not receive adequate clothing or protection from or relief from the cold.

In sum, in 1982 it was clearly established that prison inmates had a right under the eighth amendment of the Constitution to adequate heat and shelter. Viewing the evidence in the light most favorable to Henderson and Jefferson, the defendants knew of the hazardously cold conditions those two inmates were experiencing in Cellhouse B-West. Thus, under the facts we must consider, reasonable jurors could have found that the defendants' conduct in leaving Henderson and Jefferson exposed to temperatures below freezing for four days without affording them any protection beyond that usually provided when the heating system functioned properly, constituted deliberate indifference to their eighth amendment rights.

The district judge's post-verdict finding of a lack of any clearly established constitutional right under the facts of this case was erroneous, as was his resulting grant of the

protection of qualified immunity to the defendants. The existence of a constitutional right to heat and shelter protecting Henderson and Jefferson, coupled with the jury's reasonable interpretation of the facts in reaching its verdict, precluded the district judge from entering a judgment notwithstanding the verdict.

The dismissal of the consolidated case of Willie Williams and Warren Lee Harris was predicated on the erroneous grant of qualified immunity to the same defendants in the case of Henderson and Jefferson. Therefore, those dismissals were also erroneously granted.

We REVERSE the district court's grant of qualified immunity to the defendants and its entry of a judgment notwithstanding the verdict; order reinstatement of the jury's verdicts in favor of the plaintiffs Henderson and Jefferson and direct that judgment be entered thereon; and VACATE the dismissals of the complaints of Harris and Williams and REMAND those cases for further proceedings.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: August 15, 1991

BEFORE:

Honorable John L. Coffey, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge
Honorable Jesse E. Eschbach, Senior Circuit Judge

No. 88-2698

ROBERT HENDERSON and THOMAS JEFFERSON,

Plaintiffs-Appellants

v.

MICHAEL P. LANE, Director, Illinois Department of Correction; RICHARD DeROBERTIS, Warden and MICHAEL O'LEARY, Assistant Warden,

Defendants-Appellees

Nos. 88-3407 and 88-3430

WILLIE WILLIAMS and WARREN LEE HARRIS,

Plaintiffs-Appellants

v.

RICHARD DeROBERTIS and MICHAEL O'LEARY,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 82 C 1263, Judge James F. Holderman

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the district court's grant of qualified immunity to the defendants and its entry of a judgment notwithstanding the verdict are REVERSED, that the jury's verdicts in favor of the plaintiffs Henderson and Jefferson are ordered reinstated and it is directed that judgment be entered thereon, and the dismissals of the complaints of Harris and Williams are VACATED and those cases are REMANDED for further proceedings, in accordance with the opinion of this Court filed this date.

[DATED AUGUST 1, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 1263 Consolidated with No. 82 C 0887

THOMAS JEFFERSON,

Plaintiff,

v.

MICHAEL P. LANE, et al.,

Defendants.

ROBERT HENDERSON,

Plaintiff,

v.

MICHAEL P. LANE, et al.,

Defendants.

MEMORANDUM OPINION

JAMES F. HOLDERMAN, District Judge:

On July 15, 1988, this court granted defendants' post-trial motion for judgment notwithstanding the verdict on the basis of defendants' qualified immunity. This memorandum opinion sets forth the court's reasoning for that decision.

FACTS

The two plaintiffs, Thomas Jefferson and Robert Henderson, in these consolidated cases, were cellmates at the

Stateville Correctional Center ("Stateville") near Joliet, Illinois during the period from Friday, January 8 through Monday, January 11, 1982. During that period the northern Illinois region where Stateville is located suffered an unprecedented record-breaking, sub-zero cold spell. The outside temperature reached from 22° to 25° below zero with a wind chill of minus 80°.

The plaintiffs were confined in a first floor cell of the building at Stateville known as Cellhouse B-West, a five-level structure. At that time Cellhouse B-West housed inmates in protective custody and in segregation. Plaintiffs were segregated from the general prison population due to certain prison infractions they had committed within the institution.

The main heating system malfunctioned of Cellhouse B-West on January 8, 1982. Although attempts were made to repair the heating system, heat was not restored to the cellhouse until January 12, 1982. During that period there was no thermometer inside B-West, but there is no question it was cold in the plaintiffs' cellblock. Numerous windows had been broken allowing the outside air to enter the cellhouse. Several witnesses testified that people could see their breath in the cellhouse. It was cold enough in the area where the plaintiffs were housed to form ice.

In January 1982, the heating system for B-West had two parts. The main source of heat was an induction heater, which, when operating, used a single large fan to blow hot air through a tunnel duct system that discharged at ground level. As an auxiliary source of heat, the cellhouse had six individual unit heaters. The unit heater hung from the ceiling of the cellhouse. Each had its own blower, which, when operating, moved air across steam-heated

coils in the unit heater to provide heat in B-West. Steam was the source of heat for the main heater as well as the unit heaters. All steam was generated in a central plant and, when operating, steam was piped into B-West to supply both the main and unit heaters.

During January, 1982, the total inmate capacity of Stateville was 2445 inmates. Actual occupancy of the facility did not exceed 2053 inmates. During that month occupancy of B-West, both segregation and protective custody inmates, was between 350 and 400 inmates.

The plaintiffs contended at trial pursuant to 42 U.S.C. § 1983 that defendants, by failing to take various actions and continuing to house plaintiffs in the concededly cold conditions inside Cellhouse B-West during that four-day period, violated plaintiffs' eighth amendment rights to be free from cruel and unusual punishment.

The jury awarded each of the plaintiffs $3,000.00 compensatory damages and assessed punitive damages against the two defendants in favor of each plaintiff in the amount of $2,000.00 for a total damage award of $5,000.00 to each plaintiff.

The jury by its verdict awarding plaintiffs compensatory damages found that plaintiffs had shown by a preponderance of the evidence:

> [t]hat at defendants O'Leary's and DeRobertis's direction, or with their knowledge or consent, in deliberate indifference to plaintiffs' constitutional rights, plaintiffs were confined in Cellhouse B-West from January 8th through January 11th, 1982. During that time there was a malfunction in the cellblock heating system, compounded by numerous broken windows, so that temperatures in the cellblock were below freezing, and due to defendants' deliberate indifference,

plaintiffs did not receive adequate clothing or protection from or relief from the cold.

(Tr. 535; Agreed Instruction No. 12, pp. 43-44, Final Pretrial Order).

By assessing punitive damages against each defendant the jury found that the plaintiffs had shown by a preponderance of the evidence that each of the defendants acted "with malice, wilfulness, or callous and reckless indifference to the rights of others." (Tr. 541).

The Defense of Qualified Immunity

The defendants asserted the affirmative defense of qualified immunity but did not seek a pretrial determination of the issue. Instead, defendants tendered a jury instruction on the issue. (Df. inst. No. 7, Final Pretrial Order No. 7). Plaintiffs properly objected to instructing the jury on qualified immunity citing *Joseph v. Brierton*, 739 F.2d 1244, 1249 (7th Cir. 1984). Defendants withdrew their tendered "qualified immunity" jury instruction and the court took the issue under advisement with the defendants' motion for direct verdict at the close of all the evidence. After the jury returned its verdict, the defendants in their post-trial motion reasserted the argument that they are entitled to immunity from the damages awarded by the jury.

The doctrine of qualified immunity articulated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) shields public officials from civil liability for their actions until the law upon which the damage liability is premised is clearly established. The question of allowing an official qualified immunity requires an objective determination.

The Seventh Circuit recently reaffirmed the proper approach set forth in *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986) stating:

> under *Harlow* the district court must conduct a two-party analysis: (1) does the alleged conduct set out a constitutional violation? and (2) were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2).

Rakovich v. Wade, No. 85-1529, slip op. at 58 (7th Cir. June 8, 1988) (*en banc*). Consequently, the defendants' intent is of no moment to the issue of whether or not they should be accorded qualified immunity or not.

The application of qualified immunity turns on whether the plaintiffs' asserted constitutional right was clearly established in the law at the time and within the factual setting in which the defendants acted.

As the Supreme Court explained in *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right . . . . [I]n light of the preexisting law the unlawfulness must be apparent.

Even before the *Anderson* explanation, the Seventh Circuit articulated "that the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Colaizzi v. Walker*, 815 F.2d 304, 308 (7th Cir. 1987). The factual circumstances of the actions under scrutiny need not be identical to those of prior holdings, *Le Clair v. Hart*, 800 F.2d 692, 696 (7th Cir. 1986), but closely analogous, *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987) so that "reasonably diligent government officials would have known of the case law, related it to the situation at hand,

and molded their conduct accordingly," *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985).

Thus, in the case at bar, the defendants' actions must be defined or characterized according to the specific facts presented here and a comparison made to the body of law as it existed in January 1982. *See Rakovich*, *supra* at 55-56. In evaluating the specific facts regarding the issue of qualified immunity in the context of a motion for directed verdict or a motion for judgment notwithstanding the verdict, the court must consider all the undisputed evidence in the record in the light most favorable to the nonmovant." *Id.* at 47.

The specific facts presented here, a record-breaking, subzero, four-day cold spell and a malfunctioning but repairable heating system, of course, are nowhere to be found in any pre-1982 cases addressing the question of prison conditions within the context of an eighth amendment constitutional violation.

In 1987 the Seventh Circuit confronted with allegations of two months of inadequate heat in an Illinois prison held there may be an eighth amendment violation. Citing by way of example one pre-1982 Tenth Circuit opinion the Seventh Circuit stated:

> An allegation of inadequate heating may state an eighth amendment violation. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) ("a state must provide . . . reasonably adequate ventilation, sanitation, bedding, hygienic materials and utilities (i.e., hot and cold water, light, *heat*, plumbing)") (citations omitted), *cert. denied*, 450 U.S. 1041 (1981) . . . ."

Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987) (footnote omitted) (emphasis added). The *Ramos* case, an inmate class action, dealt, however, not with temporary in-

adequate heat, but with a multitude of continuing, albeit permanent and failing conditions regarding inmate shelter, food, sanitation among others.

Earlier Seventh Circuit authority, *Bono v. Saxbe*, 620 F.2d 609, 613 (7th Cir. 1980), stated:

> Appellants have not contended that access to medical care, bedding or heating was insufficient or that the nutritional value of the food was inadequate; such factors are frequently crucial to a finding of cruel and unusual punishment.

Looking beyond Seventh Circuit case law, *see*, *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987), one finds that other courts prior to 1982 had held that providing prison inmates inadequate shelter including inadequate heat, constitute cruel and unusual punishment under the eighth amendment. *See, e.g., Lareau v. Manson*, 651 F.2d 96, 106 (2nd Cir. 1981); *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981); *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980); *Wolfish v. Levi*, 573 F.2d 118, 125 (2nd Cir. 1978); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976). Moreover, the Supreme Court had stated that adequate shelter was an institution's obligation under the eighth amendment. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 529 n.11 (1979). Although these cases may have made it clear that adequate heat for inmates was a requirement for institutional compliance with the eighth amendment, none of the prior cases had dealt with the situation confronting the defendants which was temporarily inadequate heat in an eighth amendment context.

The defendants had no instructive legal precedent to look to with which to conform their actions. With hindsight plaintiffs' counsel suggested that to avoid an eighth amendment violation the defendants should have moved

plaintiffs and the entire Cellhouse B-West to other locations. (Tr. 486). Fixing the B-West heating system, which was being attempted, or the temperature rising, which was beyond defendants' control, would have produced the same result.

To properly consider the fact-specific analysis required in determining whether qualified immunity applies and considering the plaintiffs' position favorably, the question in this case should be expressed as follows:

> When the defendants confronted January 1982 the situation of being temporarily unable, due to the weather and the malfunctioning heating system, to provide adequate heat to the plaintiffs, should they as reasonable prison officials have known based upon the law at the time that to continue to house the plaintiffs in the segregation section of Cellhouse B-West in which the temperature was freezing until the heater was fixed or the weather changed rather than move them to other areas within the general prison population was a violation of the plaintiffs' eighth amendment rights?

Looking at the case law as it existed at the time and balancing the factors, cold temperatures in the cellhouse against prison security in the situation, reasonable prison officials could have differed as to whether the failure to relocate the plaintiffs violated the eighth amendment.

The Supreme Court had stated in 1979 in *Bell v. Wolfish*, 441 U.S. 520, 547,

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

It was cold in the cellhouse, but yet neither plaintiff suffered any serious medical harm as a result of the incident. The evidence shows that at least one other inmate in the cellhouse was taken to the prison medical facility during the period when the need arose.

Taking all the specific facts and the case law into account, this court cannot find the right plaintiffs asserted under the facts of this case to have been clearly established in 1982 to remove defendants' qualified immunity. Moreover, the acts of defendants under the circumstances were not so egregious as to make the qualified immunity balancing test a foregone conclusion. *See, Benson v. Allphin*, 768 F.2d 268, 276 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986). Defendants should be accorded qualified immunity.

CONCLUSION

Defendants' motion for judgment notwithstanding the verdict is GRANTED. Judgment is entered in favor of the defendants. No costs.

ENTER:

/s/ JAMES F. HOLDERMAN
JAMES S. HOLDERMAN
United States District Judge

DATED: August 1, 1988.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

CASE NO.: 82 C 887 consolidated with 82 C 1263

Robert Henderson

Plaintiff

v

Michael P. Lane, et al

Defendants

and consolidated with

Thomas Jefferson

Plaintiff

v

Michael P. Lane, et al

Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants' motion for judgment notwithstanding the jury verdict is GRANTED. No costs.

August 1, 1988
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ KATHLEEN BRANCH
(By) Deputy Clerk

[Dated November 18, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 5094

WARREN LEE HARRIS,

Plaintiff,

v.

RICHARD DeROBERTIS, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Warren Lee Harris ("Harris") seeks to bring this 42 U.S.C. §1983 ("Section 1983") action not only on his own behalf but for the entire class of prisoners who were confined in Cellhouse B-West ("B-West") at Stateville Correctional Center ("Stateville") during the four day period of January 8 through 11, 1982. Defendant Richard DeRobertis ("DeRobertis," then Stateville's Warden) and Michael O'Leary ("O'Leary," then a Stateville Assistant Warden) oppose such class certification, sought under Fed. R. Civ. P. ("Rule") 23(a) and 23(b)(3). For the reasons stated in this memorandum opinion and order:

1. Class certification is granted.

2. This action is dismissed on qualified immunity grounds.

Procedural Background

From January 8 through 11, 1982 B-West was totally without heat. That was the coldest period in the recorded history of this area (on January 10 it was 26° below zero, with a wind-chill factor of 80° below).

Two of Harris' fellow B-West prisoners, Robert Henderson and Thomas Jefferson, promptly filed pro se Section 1983 lawsuits in this District Court (*Henderson v. Lane*, 82 C 887 and *Jefferson v. Lane*, 82 C 1263), charging cruel and unusual punishment—an Eighth Amendment violation.[1] Counsel were appointed to represent those plaintiffs, and when the cases ultimately went to trial before this Court's colleague Honorable James Holderman each plaintiff was successful in obtaining a $5,000 damages award (including punitive damages) from the jury hearing their consolidated trial.

That success (coming in June 1986) triggered a flurry of lawsuits by other B-West inmates, including Harris. This Court appointed as Harris' counsel the same able lawyers who had prevailed in the *Henderson-Jefferson* cases. On December 23, 1986 they came into court with (1) an Amended Complaint expanding Harris' individual claim into one for the entire class described at the outset of this opinion and (2) a motion for class certification. This Court allowed the filing of the Amended Complaint but entered and continued the motion for certification.

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[1] As always, for convenience and because of the universality of the practice (despite its technical inaccuracy), this Court refers to the underlying Bill of Rights provision rather than citing more precisely to the Fourteenth Amendment (which is necessarily in issue where state actors are involved, and which applies the Bill of Rights guaranties only through incorporation by reference).

Needless to say, this Court is well aware of the mandate of Rule 23(c)(1):

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

For that reason, this Court's standard practice is to give prompt attention to the certification issue in any putative class action case assigned to this Court's calendar.

But this particular case presented a special situation. With the vigorously-contested trial before Judge Holderman having resulted in a verdict against DeRobertis and O'Leary, the important common questions of law and fact bearing on their liability to other prisoners in the putative class appeared to have been resolved against DeRobertis and O'Leary as a matter of offensive issue preclusion (see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and its progeny).[2] And with the predicate for *liability* of DeRobertis and O'Leary thus firmly established, the remaining issues applicable to Harris and to other potential class members would only be those of *damages* (or perhaps the possibility of no liability existing in some unusual individual case)—and those issues appeared to this Court to be clearly individual rather than class-oriented. Accordingly, so long as the *Henderson-Jefferson* judgment stood up Rule 23(b)(3) would not be satisfied here, because

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[2] As this Court has frequently written, it prefers not to use the more common terms "res judicata" and "collateral estoppel" as a contrasting pair, because the former term is also often confusingly employed as the genus including both those species of preclusion (see Justice Blackmun's thorough treatment of the subject in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984)). Accordingly this Court regularly speaks of "claim preclusion" and "issue preclusion" (just as Justice Blackmun did throughout *Migra*).

there would be a negative answer to the question whether "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ."

What caused this Court's deferral of Harris' class certification motion (rather than considering its outright denial of Rule 23(b)(3) grounds) was the pendency of post-trial motions in the *Henderson-Jefferson* cases before Judge Holderman. Counsel for both sides in this action reported those matters had been briefed and were under advisement by Judge Holderman. Because any overturning of the jury verdict—or even any modification of the substantive rulings—in those cases could have had an obvious impact on the appropriate ruling here, this action and the class certification motion were effectively put on hold pending Judge Holderman's decision.

On July 15, 1988 Judge Holderman announced his granting of the DeRobertis-O'Leary motion for judgment notwithstanding the verdict on qualified immunity grounds, and he then issued a memorandum opinion August 1 to explain the reasoning supporting that decision.[3] This Court promptly reactivated the motion for class certification, and the parties have now completed briefing the issues.

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[3] As might be expected, an appeal has been lodged from that decision, so the matter is now pending before our Court of Appeals. In the meantime there had been a number of other Section 1983 actions brought by individual plaintiffs—also members of the putative class—after the favorable jury verdict in *Henderson-Jefferson*. Since Judge Holderman's decision, several of this Court's colleagues on whose calendars those other cases were pending have dismissed them sua sponte pursuant to 28 U.S.C. §1915(d) on the strength of Judge Holderman's opinion in *Henderson-Jefferson*.

Rule 23(a) and 23(b)(3)

Although DeRobertis and O'Leary really do not seriously question (save in one possible respect) the fact that this case satisfies all the standards for class certification, a brief run-through of those criteria is in order before this Court turns to the one issue seriously advanced in opposition to Harris' motion. For convenience this opinion's capsule discussion will employ the inelegant terminology that has come to be the accepted way of talking about the Rule 23(a) standards.

As for "numerosity" (Rule 23(a)(1)), some 350 to 400 prisoners occupied B-West during the four-day period in question. All were subjected to the same conditions and are therefore putative class members. Under all the cases that plainly meets the definition of "so numerous that joinder of all members is impracticable" (see, e.g., this Court's opinion in *Williams v. Lane*, 96 F.R.D. 383, 385 (N.D. Ill. 1982); 1 Newberg, *Class Actions* §3.05, at 141 (2d ed. 1985)).

As for "commonality" (Rule 23(a)(2)), this Court has said "plaintiffs need only demonstrate there is at least one issue of law or fact common to the claims of the class members" (*Armstrong v. Chicago Park District*, 117 F.R.D. 623, 628 (N.D. Ill. 1987)). Here the crucial question is whether cruel and unusual punishment was inflicted on the class members by their being subjected to the extraordinary cold for a four-day period. That is enough.

As for "typicality" (Rule 23(a)(3)), this Court's colleague Honorable James Moran has accurately said in *Walters v. Thompson*, 615 F.Supp. 330, 334 (N.D. Ill. 1985):

> The typicality requirement is satisfied if the named representative's claims have the same essential characteristics as the claims of the class at large.

There is no real question but that description fits this case admirably. DeRobertis-O'Leary Mem. 7-8 does not quarrel with the definition (indeed it cites the same Seventh Circuit authority as Judge Moran did for that proposition), but it then goes on to assert individualized distinctions in the facts that may have impacted on different class members. It is enough to say that "typicality" is *not* synonymous with "identity," else there would never be an occasion to make the Rule 23(b)(3) determination "that the questions of . . . fact common to the members of the class predominate over any questions affecting only individual members. . . ." DeRobertis and O'Leary are simply wrong on this issue.

Finally, as to "adequacy-of representation" (Rule 23(a)(4)):

> 1. Harris meets that requirement because of the coextensiveness of his own interests with those of all other class members.
>
> 2. Harris' appointed counsel are especially well qualified to urge the class' interests vigorously and effectively, not only because of the long-standing tradition of pro bono publico service by their law firm (Jenner & Block), having the resources and willingness to act in that capacity, but also because the individual lawyers have already done yeoman and effective service in this very situation in *Henderson-Jefferson*.

Those two factors do the job (see, e.g., such cases as *Allen v. Isaac*, 99 F.R.D. 45, 55 (N.D. Ill. 1983) and *Williams*, 96 F.R.D. at 386).

So much for the Rule 23(a) requirements. In terms of Rule 23(b)(3), in the present posture of affairs the concern that had caused this Court's deferral of the certification

motion in the first place has been eliminated—indeed, to the disadvantage of the class. Now DeRobertis and O'Leary are not bound by an adverse decision in the *Henderson-Jefferson* cases, and certainly the present DeRobertis-O'Leary victory there does not bind Harris and the other class members who have not yet had their own days in court.[4]

That being so, it cannot now be gainsaid "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ." *All* class members are subject to and affected by the dominant question of liability vel non. Under present circumstances that heavily overshadows the question bearing on individual claims, which would have to be dealt with if the class were ultimately to prevail as to liability. And that means Rule 23(b)(3) has been satisfied too.

Rule 23(c)(1)

All this, however, only sets the stage for the DeRobertis-O'Leary opposition to current certification because of the earlier-quoted command of Rule 23(c)(1). On that score their Mem. 7 says this:

> Defendants object to plaintiff's motion to certify a class in this action as not timely pursuant to Rule 23(c)(1) based upon the time that has elapsed since the 1982 incident, the delay of filing for certification until the judgment in *Henderson* and *Jefferson*, the judgment notwithstanding the verdict granted to defendants in the consolidated cases of *Henderson* and *Jefferson* now on appeal to the Seventh Circuit, and

[4] Obviously the situation is not an appropriate one for application of defensive issue preclusion notions.

> the dismissal pursuant to 28 U.S.C. §1915(d) as described in the "Facts" Section above.[5]

None of those factors is at all persuasive.

As for the "time that has elapsed since the 1982 incident," there is no question this action was timely when filed—though that was four and one-half years after the incident. That is so whether limitations were inapplicable because of the two-year window established by *Anton v. Lehpamer*, 787 F.2d 1141, 1146 (7th Cir. 1986) or whether a five-year limitation period is rather the correct response to *Wilson v. Garcia*, 471 U.S. 261 (1985) (see this Court's opinion in *Shorters v. City of Chicago*, 617 F.Supp. 661, 663-66 (N.D. Ill. 1985)).

Nor does the notion of "delay of filing for certification until the judgment in *Henderson* and *Jefferson*" make any sense in current times. This action was first *filed* only after the *Henderson-Jefferson* judgment, and appointed counsel then sought to convert it to a class action promptly after their appointment. As the earlier discussion has shown, the existence of the *Henderson-Jefferson* judgment then militated *against* certification in this Court's view (and would likely have led to denial of certification had it stood up). But certainly a delay in the *filing* of this case cannot justify rejecting class certification once the effect of the *Henderson-Jefferson* judgment—an adverse effect so far as certification is concerned—has been lifted (as it now has).

As for "the judgment notwithstanding the verdict granted to defendants in the consolidated cases of *Henderson* and

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[5] [Footnote by this Court] That last "dismissal" item refers to the dismissals described in the last sentence of n.3.

Jefferson now on appeal to the Seventh Circuit," DeRobertis and O'Leary are in an odd posture in seeking to object on that ground. After all, it is in their own interest to have a like ruling made applicable to the entire class, rather than leaving DeRobertis and O'Leary even potentially subject to piecemeal claims by individual class members.

Finally, the dismissal of the few other individual actions by other judges does not counsel denial of certification. That judicial response may be suggestive of the appropriate disposition of this action *after* certification, but that is a quite different question dealt with later in this opinion.

It seems clear that what really underlies the DeRobertis-O'Leary hostility to, rather than a welcoming of, the current motion lies in the total misperception disclosed by their Mem. 6-7:

> The timeliness issue is further complicated by the fact that the Statute of Limitations has since run on the time to file an action based on this incident.

That statement is nothing short of astonishing, given counsel's citation earlier on the same page to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). *American Pipe, id.* held "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." And if any possible question remained as to the scope of that holding (because the Court there had dealt only with putative class members who chose to intervene), *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) has dispelled any such question. After explaining in detail why any such nonliteral reading of *American Pipe* was

appropriate, *Crown, Cork & Seal*, 462 U.S. at 353-54 buttoned matters up beyond dispute:

> We conclude, as did the Court in *American Pipe*, that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S., at 554. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.

In sum, because the Rule 23(b)(3) standard as well as all the Rule 23(a) criteria have been satisfied, nothing in the intervening time lapse or in the present procedural status of this or other litigation calls for noncertification of the class. In fact, responsible jurisprudence (that is, providing the appropriate judicial treatment for the benefit of both sides—DeRobertis and O'Leary as well as the plaintiff class) calls for the merits to be dealt with as to *all* class members and not on a one-by-one basis.

Decision on the Merits

Now that the propriety of class certification has been resolved, the obvious remaining question is what disposition should be made on the merits of the plaintiff class' claims. Like several of its colleagues, this Court finds the rationale for Judge Holderman's qualified immunity decision a persuasive precedent to follow. It would of course be possible to do instead what this Court's colleague Judge Prentice Marshall has done in *Boclaire v. DeRobertis*, 87 C 304: stay this action pending the final resolution on appeal of *Henderson-Jefferson*. But two factors counsel against such deferral:

1. Because this is now a class rather than an individual action, responsible jurisprudence also would seem best served by putting the case in the posture for immediate appeal (and, it might be hoped, for consolidation with the *Henderson-Jefferson* appeal if that is still possible). At a minimum the Court of Appeals will be made aware of the impact of its decision on the merits as to the entire plaintiff class.

2. With class counsel here being the same lawyers who are handling the *Henderson-Jefferson* appeal, all efforts at appeal of this case and its possible consolidation with *Henderson-Jefferson* will be simplified.

Conclusion

This Court determines, for the reasons stated at some length in this opinion, that this action may and should be maintained as a class action on behalf of all prisoners who were confined in Cellhouse B-West of the Stateville Correctional Center during the four-day period from January 8 through January 11, 1982. Then, for the reasons stated in Judge Holderman's August 1, 1988 memorandum opinion and *Henderson v. Lane*, 82 C 887 and *Jefferson v. Lane*, 82 C 1263, this Court determines that both Richard DeRobertis and Michael O'Leary are entitled to qualified immunity against the liability sought to be imposed upon them in the current action. This case, treated as a class action on behalf of the plaintiff class, is therefore dismissed with prejudice.

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

Date: November 18, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 86 C 5094

Warren Lee Harris

v.

Richard DeRobertis, et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case, treated as a class action on behalf of the plaintiff class, is dismissed with prejudice.

November 18, 1988
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ GEORGE D. SCHWEMIN
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 9267

WILLIE WILLIAMS,

Plaintiff,

v.

RICHARD DeROBERTIS and MICHAEL O'LEARY,

Defendants.

MEMORANDUM ORDER

Plaintiff Willie Williams is a member of the class described in the Complaint in *Harris v. DeRobertis*, 86 C 5094 and asserts a claim identical to that in *Harris*. By memorandum opinion and order issued today in *Harris*, this Court has:

1. granted class certification and

2. dismissed the action on qualified immunity grounds (see Judge Holderman's August 1, 1988 memorandum opinion in *Henderson v. Lane*, 82 C 887 and *Jefferson v. Lane*, 82 C 1263 on the identical issue presented in *Harris* and here).

Accordingly this action is also dismissed with prejudice.

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

Date: November 18, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 86 C 9267

Willie Williams

v.

Richard DeRobertis and
Michael O'Leary

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice.

November 18, 1988
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ GEORGE D. SCHWEMIN
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 1, 1991.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

ROBERT HENDERSON and THOMAS JEFFERSON,

Plaintiffs-Appellants,

No. 88-2698 v.

RICHARD DeROBERTIS, WARDEN; and
MICHAEL O'LEARY, Assistant Warden,

Defendants-Appellees.

WILLIE WILLIAMS; and WARREN LEE HARRIS,
Individually and on Behalf of all Others Similarly Situated,

Plaintiffs-Appellants,

Nos. 88-3407, 88-3430 v.

RICHARD DeROBERTIS and MICHAEL O'LEARY,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 887 and 82 C 1263—James F. Holderman, *Judge.*

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 86 C 5094 and 86 C 9267—Milton I. Shadur, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service requested a vote and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.